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No. 828

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In the Supreme Court of the United States

OCTOBER TERM, 1968

MARTIN STERNBACK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit.

PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Martin Sternback, hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment of conviction of mail fraud entered against him by the United States District Court for the Northern District of Illinois, Eastern Division.

Opinion Below

The Opinion of the United States Court of Appeals for the Seventh Circuit is as yet unreported. It is reproduced herein as Appendix A.

Jurisdiction

The judgment sought to be reviewed was entered on October 14, 1968. A timely petition for rehearing was denied on November 14, 1968. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1254(1).

Questions presented for Review

1. Whether the trial court erred in ruling that if the petitioner had testified in his own behalf, he would have admitted in evidence against him for impeachment purposes, a twenty-five year old conviction for an entirely unrelated narcotics felony.

2. Whether the trial court upon petitioner's belated motion to dismiss, should have examined the minutes of the Grand Jury to determine whether the indictment was based upon rationally persuasive evidence. Testimony elicited at the trial disclosed the fact that of all of the witnesses who testified at the trial, only one appeared before the Grand Jury, that all the rest executed affidavits in the United States Attorney's Office rather than appear before the Grand Jury, and where the only showing of any evidence before the Grand Jury arises from the supposition that the affidavits were either read to the Grand Jury or their contents summarized by someone who appeared before the Grand Jury.

3. Whether the evidence was sufficient to sustain a conviction of the crime of mail fraud where the record is utterly devoid of any evidence that the petitioner devised a scheme to defraud. The evidence, when viewed in a light most favorable to the government, shows only that the petitioner was a physician; that certain of his patients were claimants in automobile accident cases; that insurance companies received from the claimant's lawyers medical reports and bills on stationery bearing the petitioner's printed letterhead and some bearing his facsimile signature; that while the reports and bills contained inaccurate statements describing the injuries of the patients and the number of visits by the patients to the petitioner, there was no evidence whatsoever that the petitioner authored the reports or the bills or caused any of the mailings charged.

Statement of the Case

The petitioner, sometimes hereinafter referred to as the defendant, was indicted by the Grand Jury of the United States District Court for the Northern District of Illinois, Eastern Division, for the crime of mail fraud in violation of Title 18, United States Code, Section 1341. The indictment contained 22 counts.

Briefly stated, the indictment charged that the defendant devised a scheme and artifice to defraud certain named and unnamed insurance companies and corporations. According to the indictment, the scheme was such that the defendant, a physician, would examine persons involved in automobile and other accidents; he would prepare medical bills containing false information; the defendant would cause to be furnished to attorneys representing the persons involved in the accidents with the false reports and bills; and lastly, that the defendant caused the attorneys to send the medical reports and bills to insurance firms, companies, associations and corporations.

To support the indictment, the government was able to prove only that the defendant was a licensed physician and surgeon; that he examined certain claimants in accident cases and that insurance companies and adjustors representing the defendants in the accident cases received from various lawyers, medical reports and bills on the letterhead of the defendant which medical reports and bills contained substantial inaccuracies.

The defendant was found guilty of 21 of the 22 counts, the count having been dismissed on motion of the government. He was ordered committed to the custody of the Attorney General for a period of two years on each of the counts on which he was convicted, said sentences to run concurrently with each other and he was fined a total of $5,000.

Reasons for Granting Writ

1. Prior to the conclusion of the government's case, counsel for the petitioner advised the trial court that the petitioner had been convicted of a non-related felony 25 years previously and requested a ruling as to whether the court would permit introduction of evidence of that conviction by the government to impeach the petitioner, should he testify. (App. 107 to 109) Counsel also advised the court, that should the court indicate that it would allow petitioner to be impeached by this conviction, he would "seriously consider not putting him on the stand." (App. 109).

Although the Court of Appeals evaded the question by holding that the trial court never made a definite ruling, this was not the position of the government in its brief. The government contended in the Court of Appeals that conviction of an infamous crime could be used for impeachment regardless of the age of the conviction and that it was improper for the petitioner here to have requested a ruling in advance without taking the witness stand.

There is no doubt that the trial court ruled that he would permit the government to use the prior conviction for purposes of impeaching the defendant's credibility as a witness. The court said:

> So I will rule as the decisions have held, Mr. Bellows. In other words, I will permit it irrespective of what my own personal views on it, because I have developed some views since [the case of *People* v. *Henneman*, 323 Ill.App. 124, 54 N.E.2d 745.] There has always been a question in my mind whether it is admissible or not when its real old. And the question is, where are you going to draw the line. When are you going to say, it's recent. * * *

The question raised here is similar in many respects to the case of *Cardinale* v. *Louisiana,* October Term 1968, No. 76, in which certiorari was granted by this court on November 25, 1968. In that case, the question before the court was whether evidence of prior crimes introduced for no purpose other than criminal disposition would violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

We submit that evidence of a twenty-five year old conviction has so little bearing upon present credibility that evidence of such a conviction has no purpose other than to show criminal disposition.

The rule that proof of prior convictions may be introduced in evidence for purposes of impeachment has come under recent attack. Both the Model Code of Evidence Rule 106(1)(b) and Uniform Rule of Evidence 21 make inadmissible evidence of the conviction of a crime "not involving dishcnesty or false statement."

Most recently, the Supreme Court of Pennsylvania was faced with the question of whether the trial court should have admitted proof of a damage claimant's 12-year old pandering conviction for purposes of impeachment. Said the Supreme Court of Pennsylvania in *McIntosh* v. *Pittsburgh Railways Co.* ..... Pa. ....., 4 Cr.L. 2092, "We are hard put to understand what relevance appellant's twelve year old pandering conviction could have in helping a jury ascertain whether his description of a trolley collision was true. After being released from prison, appellant for eight years, had apparently led an exemplary life. It seems unfair to plague appellant with his prior misdeeds in any way at all at this point. * * *.

"The logical connection between pandering and not testifying truthfully in auto accident litigation twelve years

later completely escapes us. It would be surprising if any statistical correlation at all could be found between panders of twelve years ago and witness-stand liars today. * * *"

The Court of Appeals in this case spoke approvingly of Rule 21 of the Uniform Rules of Evidence. That rule provides in part:

> If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

Nevertheless, the Court said that, "Injustice resulting from the existing rule would have to be much more apparent than in this case in order to justify changing the rule by decision of a particular appeal."

One is at a loss to perceive of a greater injustice than that of a defendant in a criminal case being forced to forego testifying in his own behalf for fear of the prejudice arising from the proof of his prior conviction.

In this case, the Court does not have to reach the constitutional question posed in *Cardinale* for it may decide the case under its power to supervise the administration of justice in the Federal Courts.

Because of the importance of the question, certiorari ought to be granted.

2. The second point concerns the sufficiency of the evidence before the grand jury. The question was raised in the District Court by the defendant's Petition for Relief from Waiver of Objection Based on Defect in the Institution of the Prosecution. The Petition was filed subsequent to the verdict in the case. It was based upon the fact as brought out in the trial of the case that none of the Government's witnesses who testified at the trial ever testified before the grand jury, with the exception of one

Hubert VanPatton, an insurance adjustor, who had no knowledge of the charges contained in the indictment.

This evidence creates a strong presumption that the indictment was not based upon "rationally persuasive evidence." *Costello* v. *United States,* 350 U.S. 359, 364, concuring opinion of Burton, J. As this court has said in a different context, "Historically [the grand jury], has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution. It serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia,* 370 U.S. 375, 390.

We do not contend here, as did the petitioner in *Costello,* that an indictment may not be based upon hearsay. Nor, do we as did the petitioner in *Umans* v. *United States,* cert. granted, 386 U.S. 940; cert. dismissed ..... U.S. ....., contend that hearsay information must be corroborated by other evidence or proof of the informant's reliability.

Our contention is based upon the test established by Mr. Justice Burton's concurring opinion in *Costello.* There he said:

> "[I]t seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." 350 U.S. 359, at page 364.

The position which we take here is also in keeping with that adopted by the United States Court of Appeals for

the Second Circuit in the *Costello* case (*United States* v. *Costello,* 2 Cir., 221 F.2d 668). There Judge Learned Hand speaking for the Court said:

> "We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." 221 F.2d 668, 677.

We are at a loss to understand the reluctance of the District Court and the Court of Appeals to inspect the grand jury minutes. It would have been a simple thing for either of those courts to have read the minutes and have made the determination that there was or was not any rationally persuasive evidence presented to the grand jury. If there had been such evidence the prosecution would have been in no way impaired. If there had not been, the defendant would be entitled to a dismissal of the indictment. There can be no reasons for the preservation of convictions obtained in contravention of well established and well regarded constitutional rights.

The relief sought here would not initially affect the validity of the petitioner's conviction. This court could either vacate the judgment below and remand the cause to the District Court with directions to conduct a hearing as in *Hoffa* v. *United States,* 387 U.S. 231, or it could direct the United States Attorney to certify and transmit the minutes of the proceedings before the grand jury to the Court for its examination. Either method would suffice to insure that the indictment in this case was founded upon rationally persuasive evidence.

3. Our last point concerns the sufficiency of the evidence to convict the petitioner. While we realize that ordinarily the sufficiency of evidence does not create a question of sufficient importance to warrant this court's in-

quiry, there are involved in this case serious doubts as to whether there was any evidence of the petitioner's guilt. *Thompson* v. *Louisville*, 362 U.S. 199. The factual situation is outlined in the statement of the case. The Court of Appeals said of the various false reports and bills:

> "[T]hat there is no testimony or other direct evidence that the documents were prepared by defendant or under his supervision, that he sent or mailed them to the attorneys, or that he was told what use the attorneys would make of them. In these respects, the government's case rested on inferences from circumstances."

For reasons best known to itself, the government did not choose to call as witnesses any of the persons who transmitted the reports and bills to the various insurance companies. The Court of Appeals concluded that:

> "there was sufficient proof from which to find beyond a reasonable doubt that Dr. Sternback authored the fraudulent bills and reports. The claimants saw him shortly after their accidents and told him their troubles. They testified in a number of instances that they were referred to him by their attorneys. The bills are consistent in some respects with the truth as known to Dr. Sternback, such as the dates of the first visits and the hospitalization of some of the claimants."

None of the information from which the Court of Appeals drew the conclusion of the defendant's guilt was known only to the defendant. Indeed this information was possibly better known to the claimants and their attorneys who stood to gain far more by the fabrication of spurious documents such as these. Such fabrication has not been beyond the experience of the courts. Cf. *United States* v. *Shavin*, 7 Cir. 287 F.2d 647, 649.

The Court of Appeals indulged in a presumption of a type which contravenes the due process clause of the Fifth

Amendment. The constitutional test is that a presumption cannot be sustained if:

> "there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot* v. *United States,* 319 U.S. 463, 467-468.

The only fact proved in this case was that insurance companies received certain purported reports and bills from certain attorneys, and that the reports were on stationery containing the petitioner's name. It cannot be said that merely because one's name is on a writing that he authored that writing. As the United States Court of Appeals for the District of Columbia said in *Mancari* v. *Frank P. Smith, Inc.,* D.C. Cir., 114 F.2d 834, 836:

> "The mere presence in printed material of the name of a particular person constitutes no substantial evidence that that person caused such material to be written or published."

In his dissent in that case, Justice Rutledge opined that:

> "there was nothing in the contents or in the advertising matter to indicate that another person was interested in the business, the product, the advertising or having it distributed."

From this dissent, may be derived the rule which we believe controls the present situation and that is that there can be no rational connection between the fact of the reports and bills on the letterheads of the petitioner and the ultimate fact that he authored them where there were others who had considerably more to gain by the fabrication of spurious documents who had a closer evidentiary connection with the documents. The Court of Appeals indulged itself in a presumption which in effect, shifts to

the defendant the burden of proving his innocence. As the Court said in *Tot*:

> "It would * * * be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forth with evidence to rebut it. But, as we have shown it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to the guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient access to proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship." 319 U.S. 463, 469-470.

This leads us to the second part of the point on the sufficiency of the evidence and that is that the government failed to prove the jurisdictional element of the crime charged that the petitioner caused the mailings charged in the indictment. There was no direct evidence of the fact that the petitioner knew that the persons whom he examined were going to present claims against the parties with whom they were involved in the accidents and consequently their insurance carriers. There is no direct proof that the petitioner knew that reports should be communicated to insurance companies as a basis for settlement negotiations.

This case is unlike *Pereira* v. *United States,* 347 U.S. 1, where the defendants could reasonably foresee that the mails would be used in execution of their scheme to defraud. There the defendants had procured a check by fraud. The check was drawn on an out of state bank and when they delivered it to a local bank for collection, they could reasonably foresee that the latter bank would use the mails, in the ordinary course of business, to collect from the out-of-state bank. In this case, the government

can point to no such foreseeable course of conduct. In negotiations over settlements for claims for personal injuries, it is just as foreseeable that the documents would be hand carried by the attorneys to the insurance companies; that the insurance companies would conduct its business through inter-office memos within the same building without the use of mail and that the attorneys would pick up the releases at the insurance companies' offices, call their clients to come into the office to sign them, hand-carry the releases back to the insurance companies pick up the checks, call their clients to come in and endorse the checks and receive their share of the recovery, deposit the checks in the bank and have checks sent through the central clearing house by means of private messenger without the mails being once used. Indeed, in a large metropolitan area such as Chicago, where the transactions in this case occurred, such procedures may likely be the rule, rather than the exception. In such case, the foreseeability of the use of the mails is very dim indeed.

We realize that in some polite circles it is deemed gauche to inveigh against incursions of federal power into local affairs. The crimes involved here have no great federal significance. Whatever Dr. Sternback's deeds were, they do not place the Union in jeopardy of dissolution. There is no showing that the State of Illinois could not have prosecuted just as easily as did the United States. There is no showing that state authorities were lax in prosecution of this category of crime. The United States Attorney in office at the time of this prosecution is now the State's Attorney of Cook County and there is no reason to believe that he will not prosecute as vigorously as State's Attorney as he did as United States Attorney.

At a time when it is being realized that the states must be made better able to confront the problems which face

this nation, it is most apparent that the government's position and that adopted by the Court of Appeals seriously endangers the constitutional relationships between the states and the federal government. There has been a disturbing tendency to create a general federal police power out of the limited powers delegated to the national government by the constitution. The use of such fictions as the foreseeability of the use of the mails is but one method of creating this general federal police power. The commerce clause has also been used to an extent greater than that ever contemplated by either the founding fathers or the proponents of such recent legislation as the Hobbs Act. See *Amabile* v. *United States* now pending in this court on petition for Writ of Certiorari, as Case No. 129, October Term, 1968.

Because of the importance of this case as it bears upon questions of federal jurisdiction and upon the state federal relationship, certiorari ought to be granted.

Conclusion

For the above and foregoing reasons, a Writ of Certiorari ought to issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case.

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